NO. 21474

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES E. LOFLAND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTION

This is an appeal from an order of the United States District Court for the Central District of California, entered September 12, 1966, denying appellant's motion to vacate and set aside his sentence, judgment, and indictment under the provisions of Title 28, U.S.C., Section 2255 [T.R. p. 13]. 1/

The jurisdiction of the District Court rested on Title 18, U.S.C. Sections 2315 and 1343 and Title 28, U.S.C. Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's "2255 Motion", pursuant to Title 28, U.S.C. Sections 1291 and 1294.

1/ "T.R." refers to Clerk's Transcript of Record.

II

STATUTE INVOLVED

Title 28, United States Code, Section 2255 provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional

rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

III

STATEMENT OF THE CASE

On September 23, 1964, a five count Indictment was returned by the Grand Jury for the Southern District of California charging appellant in four counts with violation of Title 18, United

States Code, Section 1343, wire fraud and Section 2315, sale and receipt of stolen securities [T. R. p. 31]. On October 12, 1964, appellant represented by retained counsel, Thomas W. Lefner, was arraigned before the Honorable Albert L. Stephens. At that time the defendant entered a plea of not guilty. On February 25, 1965, after a court trial before the Honorable Jesse W. Curtis, the appellant was found guilty on all five counts. On April 12, 1965, appellant was sentenced to the custody of the Attorney General for a period of ten years.

On April 22, 1965, appellant filed a timely notice of appeal [T. R. p. 37]. On April 28, 1965, appellant filed an application for leave to appeal in forma pauperis. In the application the appellant made no request for the appointment of counsel. The application was signed by appellant [T. R. p. 39]. On April 29, 1965, the District Court entered an order permitting appellant to appeal in forma pauperis. The appellant thereafter designated the transcript of record on appeal with the notation that he was appearing in propria persona. On October 14, 1965, appellant's trial counsel, Mr. Thomas Lefner, wrote the Court of Appeals informing this Court that he was acting for appellant as an accommodation and that appellant was appearing pro se. At the time appellant filed his brief, appellant wrote this Court requesting that counsel be appointed to argue his case, or that he be given leave to appeal to argue the case. The appellant reiterated that his brief was filed in pro per. This Court responded by appointing Mr. Lefner to argue the case for appellant and he did so on

February 2, 1966. On March 8, 1966, this Court affirmed the judgment of conviction of the District Court [357 F. 2d 472]. In this Court's opinion, it was noted at page 476 that appellant had appealed in propria persona. On April 7, 1966, appellant filed a motion for rehearing before this Court. For the first time, appellant alleged as grounds for the rehearing that he "was denied competent counsel to prepare his brief." On June 6, 1966, this Court denied appellant's request for rehearing.

On June 30, 1966, the appellant petitioned for a writ of certiorari before the Supreme Court of the United States. On January 16, 1967, the petition was denied.

On September 8, 1966, appellant filed the instant Section 2255 motion claiming he was "deprived of his right to counsel on appeal." On September 12, 1966, the District Court denied the appellant's motion, stating:

> "The record before this court shows that the petitioner was represented at the time of plea, during the trial, and at the time of sentence by an attorney, and further indicates that the appeal was taken in propria persona. There is no record or indication of any kind that the defendant at any time requested the appointment of an attorney to represent him on appeal, at least in so far as this court is concerned."

On October 7, 1966, the District Court denied appellant's motion for a rehearing [T. R. pp. 18-19]. It is from the denial of

the September 12, 1966 motion that the present appeal stems.

IV

ARGUMENT

THERE IS NO ERROR IN THE COURT'S FAILURE TO APPOINT COUNSEL ON APPEAL WHEN NO REQUEST FOR COUNSEL WAS MADE BY APPELLANT.

The provisions of Title 28, Section 1915(d) proceedings in forma pauperis, state that "the court may request an attorney to represent any such person unable to employ counsel. . . . " This sentence has not been construed to require the trial or appellate courts to appoint an attorney on appeal in the absence of a request for assistance by the appellant.

Appellant at no time requested assistance of counsel to perfect and prepare his appellate brief. On the one occasion that counsel was requested by appellant to argue the appeal this Court immediately requested appellant's trial counsel to assume that responsibility.

> To hold it error not to appoint counsel never asked for would create automatic grounds for appeal in every criminal case. Such has never been the rule.
>
> Tucker v. United States (C.A. 9, 1962), 308 F. 2d 798, 802, citing, Thompson v. Johnson (C.A. 9, 1947), 160 F. 2d 374; and Brown v. Johnson (C.A. 9, 1942), 126 F. 2d 727.

An examination of the record in this case fails to disclose any request prior to the filing of appellant's brief for an attorney. On the contrary, the record does reflect that at all times the appellant was acting in propria persona. The notice of appeal was filed by appellant, the designation of record was signed by appellant appearing pro per, the appellant's brief, filed in his name made numerous references as to his own representation; the Court of Appeals in its opinion affirming the conviction also noted appellant had appealed in propria persona.

The cases discussed by appellant concerning right to counsel at the trial level can not be applied to the appellate procedure. As stated in Pate v. Holman (C.A. 5, 1965), 341 F. 2d 764 at p. 773:

> "The right to counsel on appeal stands on a different footing, not only constitutionally but as a practical matter, from the right to counsel during earlier stages of a criminal proceeding. An appeal is not a prerequisite to the execution of a sentence, whereas the proceeding leading up to and including a judgment are such a prerequisite. The right to a fair trial is primary and fundamental. A right of review is secondary, and exists only as an added safeguard against denial of the primary right. The obligation of the state to see that the defendant receives a fair trial is absolute; to provide him an appellate review is optional. That due process compels the court affirmatively to advise a defendant

of his right to counsel at the trial stage does not lead to a conclusion that he must also be advised at the appellate stage." (Emphasis added.)

Thus, in the absence of a request for counsel on appeal the court is not obliged either to initiate an inquiry concerning counsel or to extend an invitation to appellant to have an attorney appointed.

V

CONCLUSION

The District Court did not err in denying appellant's Section 2255 motion on the grounds set forth above and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT
Assistant U. S. Attorney